



NOTES OF THE WEEK

Justice of the Peace

and LOCAL GOVERNMENT REVIEW

ESTABLISHED 1837

[Registered at the General Post Office as a Newspaper]

LONDON:

SATURDAY, JULY 12, 1958

Vol. CXXII No. 28 PAGES 442-456

Offices: LITTLE LONDON, CHICHESTER,
SUSSEX

Chichester 3637 (Private Branch Exchange).

Showroom and Advertising:

11 & 12 Bell Yard, Temple Bar, W.C.2.
Holborn 6900.

Price 2s. 9d. (including Reports), 1s. 9d.
(without Reports).

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How to Receive Her Majesty's Judges

After the reception of Her Majesty's Judges in Kingston for the opening of the Surrey Assizes recently, Mr. Justice Cassels told the mayor and town clerk and other members and officials of the corporation that the manner in which Kingston had received the Judges (himself and Mr. Justice Hinchcliffe) was an example which could well be followed by other Assize towns. He added that Judges should be seen by the people, and the arrangements made by the corporation had provided a magnificent opportunity for that to be done. "You have shown how to receive Her Majesty's Judges," he said.

The Judge's remarks were made after the service in the parish church which preceded the opening of the Assize. The two Judges walked in the procession from the church to the Guildhall along a route lined by men from the East Surrey Regiment's Kingston dépôt. As the Judges passed each section presented arms. The men, in exercise of the regiment's right as freemen of the town, had marched from the dépôt, headed by the regimental band, with bayonets fixed. Six mounted police trumpeters sounded fanfares as the Judges arrived by car to enter the church. The arrangements made attracted large crowds to the procession after the church service.

For our information on this event we rely on the *Surrey Comet* of June 25.

Sent Back to Ireland

In the case of *R. v. Flaherty* (*The Times*, June 24) the Court of Criminal Appeal set aside a sentence of borstal training passed at quarter sessions on a young Irishman who had come here in 1956. The Lord Chief Justice, after referring to the defendant's antecedent conduct, said there seemed no reason why the British taxpayer should pay the considerable sum required to keep this Irish boy in borstal.

Lord Goddard told the appellant he would be bound over in the sum of £10, that he would accompany an escort to the train, where he would be sent to Ireland as soon as practicable and that he would not land again in this country for three years.

A magistrates' court, which has no inherent powers comparable with those of the Judges, could not in our opinion, impose such conditions upon a defendant by a recognizance. They could do so by way of requirements in a probation order, but a probation order would be inappropriate in a case where the defendant was required to live in another country with the result that the probation officer could not possibly exercise effective supervision.

Detention Centres

Detention centres have been coming in for some criticism, with what justification we are not in a position to say, but that is not to say that they should not be provided in sufficient number to meet the needs of the courts. The absence of sufficient accommodation can only lead to the passing of more short prison sentences.

A case recently reported in *The Times* exemplifies the results of the shortage of vacancies in a detention centre used by metropolitan and other courts. A lad aged 18, convicted of receiving, had been remanded, and the learned magistrate, realizing, as he said, that this was a turning point in the defendant's life, had obtained borstal, probation and detention centre reports. Both the prison governor and the probation officer were of opinion that the lad needed a sharp lesson, as he did not respond to probation. The magistrate was informed that there would be no vacancy in the detention centre until after August Bank Holiday. The magistrate observed that if there was no means of sending such offenders to a detention centre, the inevitable result would be that sentences of imprisonment would be passed, which was just what Parliament wanted to avoid. Considering the colossal national expenditure, he thought that money could be spent on another centre. As for this lad, he committed him in custody to quarter sessions with a view to the passing of a sentence of borstal training.

The Penalty for Driving While Disqualified

Section 7 (4) of the Road Traffic Act, 1930, provides that a person guilty of one of the offences under that

subsection (including driving whilst disqualified) shall be liable on summary conviction to imprisonment for a term not exceeding six months. If a court thinks, having regard to the special circumstances of the case, that a fine would be an adequate punishment for the offence they may impose a fine not exceeding £50. An offender is also liable to both the imprisonment and the penalty referred to above.

In order to justify a fine, with no imprisonment, a court must find special reasons in accordance with the various decided cases on that point; but if any term of imprisonment is imposed the question of special reasons does not arise. An unusual sentence in such a case is reported in the *Newcastle Journal* of June 25. A defendant was charged with driving while disqualified and with making a false statement to obtain an insurance certificate. He was said to be 28 years of age, to have 35 previous convictions for motoring offences and to have been sent to prison on a previous occasion for driving whilst disqualified.

On this occasion the court fined him £20 for the offence in relation to the insurance certificate and for the offence of driving whilst disqualified fined him £10 and sent him to prison for seven days. He had denied driving the car but the court found the charge proved. The details of the offence are not given in any detail (it appears that he was seen driving home, with his wife, at 10.45 p.m.) but it would seem to have been difficult to find special reasons for not imposing a sentence of imprisonment. It cannot be denied that the seven day sentence is a sentence of imprisonment and special reasons were not required.

Speed Kills

Two recent newspaper reports illustrate the truth of the warning notice "speed kills" which is to be seen on posters on the highway. An 18 year old motor cyclist pleaded guilty to causing the death of a three year old child by dangerous driving. The learned Judge told him "the simple explanation of this accident is that you were going a great deal too fast and when you came to this bridge you were unable to take it." The child was a passenger in a motor cycle combination with which the defendant's motor cycle collided on a bridge. The offender was fined £15 and disqualified for driving for 10 years. By virtue of s. 27 of the Road Traffic Act, 1956, no application can be made for the removal of this

disqualification until three years have elapsed. This case was reported in the *Derbyshire Advertiser* of June 14.

The other case, reported in the *Surrey Comet* of June 25, was one in which a 71 year old woman was knocked down and killed on a zebra crossing. The evidence for the prosecution was that when she was about half-way over the crossing the car which struck her was about 70 yds. away. Her body was found 90 ft. from the crossing. The car driver in this case was convicted of causing death by dangerous driving and was sent to prison for six months. The learned recorder in passing sentence, said "There can be no doubt that you approached this crossing at far too great a speed. You were taking a chance which was quite unwarrantable." It is reported that the offender's licence was endorsed, but no mention is made of any disqualification in his case.

The courts can act to discourage excessive speed only when cases are brought before them, but they do not have to wait for fatal accidents such as the two referred to above. Disqualifications by magistrates' courts in cases of excessive speed and of dangerous driving could be imposed much more frequently than they are and might do much to make drivers think twice before committing such offences. If excessive speed, which includes driving at any time faster than the circumstances warrant, could be satisfactorily discouraged there would be fewer accidents.

Compensation for Damage

The *Daily Express* recently had an account of an escapade by a young man which led to his appearance in a magistrates' court and his conviction on a charge of malicious damage. It was stated that he cut the wire fence surrounding the atomic research station at Aldermaston on the pretext that he wished to test the security measures there and show them to be imperfect. Having got in, he started a fire, but no alarm was raised, and he followed the same procedure a second time. He was placed on probation and ordered to pay for the damage, which was said to be £42.

This must have been an indictable offence dealt with summarily by consent, apparently under s. 51 of the Malicious Damage Act, 1861, as the summary offence under s. 14 of the Criminal Justice Administration Act, 1914, is where the amount of the damage

does not exceed £20. There is no general power in a magistrates' court dealing summarily with an indictable offence to order payment of compensation or damages, and so in this case there would have been no question of compensation if a fine had been imposed. However, when a court makes a probation order it has power under s. 11 (2) of the Criminal Justice Act, 1948, to make such an order for a sum not exceeding £100.

As the case was considered suitable for probation, there was fortunately the power to make the offender pay for the damage he had done, thus compensating the prosecuting authority without its having to proceed with a civil action. The decision is in accord with the growing feeling that those who suffer through other people's offences should not be forgotten. It also has the advantage of accomplishing two objects: it makes the offender pay, and it subjects him to what may be salutary supervision.

Public Service Vehicles (Equipment and Use) Regulations, 1958. (S.I. 1958 No. 926)

These regulations came into force on July 1, 1958. They repeal and consolidate, with amendments, the corresponding regulations of 1941, and the amending regulations of 1942, 1943 and 1950.

The regulations deal with obstruction of entrances, exits and gangways, obstruction of the driver, body maintenance, lamps, maintenance of steering arms, filling of petrol tank, carriage of conductor, carriage of inflammable and dangerous substances, markings on public service vehicles, and the carriage of fire extinguishing apparatus and first aid equipment.

Regulation 5 fixes a maximum penalty of £20 for any person who uses, causes or permits to be used on a road a vehicle in contravention of, or fails to comply with, any of the regulations.

The regulations no longer deal with the maintenance of speedometers or exhaust pipes or with the drawing of trailers as these matters are covered by the Motor Vehicles (Construction and Use) Regulations, 1955. Steering arms must now be kept "free from rust" and not, as formerly, "clean and free from rust" (reg. 10). The wording of reg. 13 (carriage of inflammable or dangerous substances) is different from that of the former reg. 12 although the effect is very similar. Regulation 15, dealing with the fire extinguishing apparatus which must be carried, specifies

in much greater detail the possible types of apparatus than did reg. 2 of the repealed regulations, and the first aid equipment has to be carried "in a readily accessible position" and in a suitable receptacle properly marked so as to be easily distinguishable."

Sexual Intercourse and the Question of Cruelty

The question of refusal by either husband or wife to have sexual intercourse is not infrequently an element in cases where either desertion or cruelty is alleged. *Clark v. Clark* (The Times, June 25) threw some further light on the subject of cruelty. The Judge, on the hearing of the wife's petition, had found that she had not proved cruelty, refusing to draw the inference from the evidence, including medical evidence, that there was in any sense conduct on the husband's part directed against his wife.

On appeal, the Court of Appeal declined to interfere with the conclusion of fact at which the Judge had arrived.

Hodson, L.J., who delivered the leading judgment, observed that there was no close category of acts or even of omissions which could or could not be regarded as cruelty. He referred to *Jameson v. Jameson* (1952) 116 J.P. 226; 1 All E.R. 875, *Squire v. Squire* (1948) 112 J.P. 319; 2 All E.R. 51, and *Kaslefsky v. Kaslefsky* (1950) 114 J.P. 404; 2 All E.R. 398, and said it was clear on the authorities that the courts of this country had never sought directly to enforce matrimonial intercourse, or, stating the same thing in other words, refusal of matrimonial intercourse had never been regarded as a matrimonial offence. Each case had to be considered on its particular facts.

Borstal Sentences

The suitability or otherwise of a second or third sentence of borstal training was the subject of an important judgment of the Court of Criminal Appeal in *R. v. Noseda and Others* (The Times, June 24). The judgment should of course be read in full, but one or two points may perhaps be mentioned here.

The Lord Chief Justice who delivered the judgment of the Court, said there was no general principle applicable to all cases, but the occasions on which a third sentence was appropriate were likely to be rare. The first question to be considered when there has already been a sentence of borstal training, was whether the offender was

a person who had been released from borstal on licence, or an absconder from borstal or a person who had remained absent without leave from borstal, for example, after a visit to his home. A person released from borstal on licence might fairly be said to have shown some response to his training and was *prima facie* in a different class from a person who either absconded from borstal or was absent without leave. Lord Goddard went on to discuss the question of recall by the Prison Commissioners and said it was important that when a person committed an offence while on licence the court should know what it was proposed to do about recall before it passed sentence. He then stated briefly the practice of the Prison Commissioners. Generally a short term of imprisonment with a view to recall to borstal would be appropriate. Sometimes however, a further sentence of borstal training would be appropriate. In the case of absconders and those absent without leave, something depended on the period of training they had so far undergone. If a person absconded after undergoing more than 12 months of training and committed an offence, the court which had to deal with him, or the Prison Commissioners, might take the view that further borstal training was unlikely to be of benefit and accordingly that imprisonment was the only alternative.

Children and Discipline

Sir Basil Henriques, with his long experience as a chairman of juvenile courts and as a worker among boys has definite ideas about discipline. Speaking at a school prize-giving, he said, according to the *Manchester Guardian*, that parents are terrified of their children and the children get away with it every time. One of the things missing today, said Sir Basil, was discipline. There was a theory that schools should be run with no competitions, no rewards, and no punishments. All this, he said, sounded very good, but it did not bear the slightest resemblance to reality.

We read not long ago of a boy brought before a juvenile court as in need of care or protection who was said to put his stepfather in fear and even to have shut him out of the house—which seemed to indicate that it was the father rather than the boy who was in need of protection. It may well be that Sir Basil Henriques is right in thinking some parents are terrified of their children. If so, it must almost always be because of lack of early

discipline. If children were perfect there would be no need for punishment or reward, but because they are imperfect and not yet capable of self-discipline (some people never are) they need firm, if kindly, discipline at home and at school. Rewards and punishments, both in moderation, are useful stimuli to the average child, and need not prevent them in later life from developing good habits without them. A well-disciplined child is by no means a repressed child, and to dispense with discipline is to invite just the wrong kind of self-expression.

The Magistrates and their Clerk

In that excellent little periodical *The Suffolk Magistrate*, edited by Mr. J. N. Martin, clerk to the Lowestoft justices, there appears an abridged version of an address given by Mr. Leslie Pugh, which contains interesting information and useful advice. Having briefly traced the origin of petty sessions and the history of the clerk from the time when he was an untrained personal assistant to a justice of the peace until he became clerk to the justices, with statutory qualification, Mr. Pugh proceeded to describe the relationship between the clerk and his bench, using the words of the late Sir Leo Page, as one which was "delicately poised."

Having been for many years a clerk to justices and being now a stipendiary magistrate, Mr. Pugh can appreciate the position as seen from both standpoints. He emphasized the fact that the clerk is not employed by the magistrates' courts committee, although that committee appoints him, and this because no executive authority can control the clerk in his office as adviser to the justices.

Referring to what has come to be known as the *East Kerrier* case and subsequent pronouncements on the retirement of the clerk with the justices, Mr. Pugh insisted on the duty of the clerk to tender his advice if a point of law is involved, and not wait to be asked. We agree because the justices might not even be aware that there was a point of law unless the clerk directed their attention to it.

We agree also that it is quite proper for magistrates to consult the clerk on the question of penalty if they so desire, not in order that he shall tell them what penalty to impose, but in order that they may be informed about penalties that have been imposed in similar cases by their colleagues. This may help to prevent a divergence of practice that might give rise to some justifiable criticism.

The Perpetual "L" Driver

We have written before on this subject so we call attention, without further comment, to yet another example of the perpetual learner which has come to our notice through a report in *The Birmingham Post* of June 19. The report states that the defendant, who had held a provisional licence for almost four years was urged yesterday by a local bench to take his driving test. He had pleaded guilty to four offences, *i.e.*, driving without due care and attention, failing to conform to a halt sign, being unaccompanied by a qualified driver and not displaying "L" plates. He was fined a total of £10 with £3 1s. 4d. costs and his licence was ordered to be endorsed. He was not disqualified. The chairman is reported as saying "There ought to be some stipulation as to how long provisional licences should be continued."

Land Values Again

Local authorities will be looking anxiously to see what follows, on lines foreshadowed in a letter written by the Minister of Housing and Local Government to Captain Corfield, M.P., in reply to a request that the Government would adopt the Compensation and Planning (Acquisition) Bill. The Bill was widely supported on the Government side of the House of Commons, and has received a second reading. Its purpose is to ensure that fair market value shall be the basis of compensation when land is acquired compulsorily. The Government, says Mr. Brooke, recognize that there is much to be said in favour of this principle, but it would place an additional burden on public funds, which ought not to be done by a private member's Bill. The Minister's letter further stated that the Government were examining the existing basis of compensation and that amending legislation might follow. In the meantime they expressed no opinion upon Captain Corfield's Bill, except that it could not be allowed to pass into law. If one looks at the matter in the abstract, it is hard to see any answer to the claim that fair market value ought to be paid for property acquired under compulsion. Unfortunately, the problem has been complicated by a century and a half of acquisitions at values enhanced by scarcity or by damage for disturbance on the one hand, and on the other hand artificially restricted in response to theories about the true source of land values. It is as difficult today to isolate the conception of "fair" market value in relation to the purchase of property as it was in the

Middle Ages to discover the *justum pretium*, or to lay down a firm distinction between morally justifiable and usurious rates of interest, when money came to be treated as an article of commerce.

The way in which controversy about the meaning of "fair" market value can hinder agreement about what otherwise would be a non-controversial issue, is illustrated in discussions now going on about the vacant site in Trafalgar Square. For many years this site was occupied by Hampton's drapery and furniture shop, which was destroyed by enemy action during the war. It is now available for building, and a strong case has been made out for its being used for purposes of the National Gallery, which it adjoins. Experience with other sites in central London suggests that the probable alternative would be a large office building. It is understood that before long the National Gallery will need further exhibition space and storage space, for which the site is well adapted. A motion on the order paper of the House of Commons in favour of its being used in this way has, however, been countered by an amendment to the effect that this should only be done if fair market value is paid, for whatever private interests have to be acquired. It is impossible to form an opinion about the merit of this amendment, without knowing what the outstanding private interests are—much property in the neighbourhood is held on leases from the Crown, and extinguishment of private interests might involve no more than the surrender of a portion of a lease. In any event, rebuilding by a private owner would require planning approval and (if the site is Crown land) the consent of the Crown authorities. In private hands, therefore, its value as a building site might be small, and the real issue is not what compensation should be paid to private owners, but how the site ought to be used, by anybody. There might be a temptation for the Government, if they had sole control, to let the site be used for a profitable commercial purpose rather than for the National Gallery: this, we take it, is the danger aimed at by the original motion in the House of Commons, and it would be a pity to obscure the point.

Controls Over Borrowing

The 1957 Report of the Ministry of Housing and Local Government has some comments on local authority loans. It reveals that in 1951-2 total new borrowing of local authorities was £400 million, and 85 per cent. of this total came from the Public Works Loan

Board: in 1956-7 new loans were estimated at £500 million, but only 22 per cent. will be provided by the Board. This drastic change well illustrates how effective have been the obstacles placed in the way of local authorities who might have wished to borrow from the Board.

The report also refers to the re-imposition of the restriction in force before 1955 by which stock issues and placings could only be made for amounts of £3 million or more. The writer of the report comments that the change had the effect of reserving the stock market for those authorities whose needs were larger than could readily be met in the mortgage market and thought that it would make room in the mortgage market for the smaller authorities for whom, so he said, the latter was better suited. It is no more true or untrue to say this than to comment that during the recent bus strike there was room on London underground trains during the rush hours. In both cases there is and was acute overcrowding and concomitant pain either physical or financial: these drawbacks are not mentioned in the report but they should be: the author's complacent air is not justified.

In the market the scarcity of accommodation is exploited by lenders and interest is charged at a higher rate than on comparable government borrowing or on local authority stock issues. We believe it wrong that public funds should be wasted in this way.

There is a simple remedy and improvement, which we have advocated before. It is to apply to the local authorities what has been found appropriate for the nationalized industries, that is, to enlist government credit on their behalf or, in other words, to make available again to local authority borrowers funds from the Public Works Loan Board. We confess never to have been impressed by the alleged disadvantages of this procedure; instead there are great advantages, the chief of which is that the public who have to pay the interest either through rates or taxes or both would be called upon for the minimum sum possible, uninfused by scarcity conditions and the bidding of borrower against borrower. And equally important, we consider there is no substance in the view that such a procedure would produce locally inspired extravagance. Nothing need be feared on this score while effective control remains tightly held by the Government and exercised through capital programmes and loan sanctions.

RIGHTS AND OBLIGATIONS OF A PUTATIVE FATHER IN RELATION TO THE ADOPTION OF HIS CHILD

The attitude of our law today towards the relationship of putative father and illegitimate child has two marked, and yet apparently contradictory, characteristics—the emphatic denial of parental rights to the putative father and the increasing recognition of his financial obligations.

The first of these characteristics can be seen in the following passage from the judgment of Denning, L.J. (as he then was) in *Re M (an infant)* [1955] 2 All E.R. 911, at pp. 912-3:

"... The natural father has no right at law to succeed on intestacy. He has no right at all, so far as I can see, though no doubt he can apply for the child to be made a ward of court just as anyone else can. The truth is that the law does not recognize the natural father at all. The only father it recognizes as having any rights is the father of a legitimate child born in wedlock."

The second of these characteristics can be seen in the decision of the Divisional Court in *Kruhlak v. Kruhlak* [1958] 1 All E.R. 154. In this case it was held that the phrase "single woman" in s. 3 of the Bastardy Laws Amendment Act, 1872, included a married woman in relation to her own husband when, at the time of her application, she was living apart from him under a separation order. Before this decision it was generally considered that in no circumstances could a married woman be regarded as a "single woman" *quoad* her own husband. However, *Mooney v. Mooney* [1952] 2 All E.R. 812, the decision thought to establish this proposition, must now be confined to its own particular facts—the complainant had left her husband against his will, and, although he was ready to receive her back, she refused to return. *Kruhlak v. Kruhlak* is to be welcomed in that it does something to improve the financial position of the illegitimate child who is incapable of being legitimated.

The two characteristics just discussed and illustrated are to be seen in recent developments in the law of adoption so far as it affects the relationship of putative father and illegitimate child. In this article we propose to examine some of these developments.

Putative Father's Consent to an Adoption Order

Before an adoption order can be made various consents have to be obtained or dispensed with. Amongst the consents required are those of "every person or body who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant"; (Adoption Act, 1950, s. 2 (4) (a)). In *Re M (an infant)*, *supra*, the Court of Appeal held that a putative father is not a "parent" for the purposes of this provision, and hence his consent is not required unless he is legally obliged to maintain the child.

The grounds upon which the statutory consents may be dispensed with are set out in s. 3 of the Adoption Act, 1950, and include cases in which the court is satisfied that the consent is being "unreasonably withheld" (s. 3 (1) (a)). In *Re D (an infant)* [1958] 1 All E.R. 427, the Court of Appeal was called upon to consider the test to be applied when deciding whether the consent of a putative father was being "unreasonably withheld" for the purposes of this provision. We have already noted that when the provision is being considered in relation to the parents of a legitimate child (and the mother of an illegitimate child) the primary consideration

is not the welfare of the child itself but whether the attitude of the parent in refusing his or her consent is unreasonable as a parent (*see* 120 J.P.N. 659). That this test may operate to the detriment of the child is clear from the decision in *Watson v. Nikolaisen* (1955) 119 J.P. 419; 2 All E.R. 427, and the fact that a custody application by the parent against the prospective adopters might fail tends only to promote that most unsatisfactory concept, *de facto* adoption. Hence we can welcome the present decision since it establishes that the "attitude of the parent" test has no application to cases involving a putative father and his illegitimate child. The Master of the Rolls considered that in such cases "the primary test at any rate (without putting it any higher) of the right order to make is that of the welfare of the child" (*see* p. 430). Parker, L.J., seems prepared to go even further. At p. 431 he says: "I think it is clear that in a case, such as this, of the putative father, the primary consideration, if not the only one, must be the welfare of the infant."

Although this decision marks a further weakening in the legal ties between a putative father and his illegitimate child it is clearly designed to advance the welfare of illegitimate children generally. Some may regret that the test it establishes for determining whether a consent is being "unreasonably withheld"—at least in the more modified form stated by the Master of the Rolls (this does not suggest that the child's welfare should be the sole consideration)—cannot be applied in all cases irrespective of the status of the parties.

Welcome though the decision in *Re D (an infant)*, *supra*, is, it is unlikely to have much influence. The Children Bill, now before Parliament, will make it unnecessary to obtain or dispense with the consent of a putative father be he legally obliged to maintain his child or not (*see* cl. 18 (1)). This carries into effect the recommendation contained in para. 104 of the Report of the Departmental Committee on the Adoption of Children. However, the Bill does not follow the Committee's recommendation to repeal the "unreasonably withheld" provision (*see* para. 120) although it does add a new ground for dispensing with the consent of a parent or guardian. This allows the court to dispense with the consent if it is satisfied that "the parent or guardian of the infant has persistently failed without reasonable cause to discharge the obligations of a parent or guardian of the infant, and that the failure is likely to continue if the order is not made" (*see* cl. 18 (3)). The effect of this provision must surely depend upon how the courts interpret the words "without reasonable cause"; a liberal interpretation could render it as ineffective as the present "unreasonably withheld" provision.

Effect of Adoption on a Putative Father's Financial Obligations

So far we have seen that neither Parliament nor the Judges have shown any inclination to recognize that a putative father has any parental rights when it comes to the adoption of his child. This is consistent with the first of the two characteristics to which we referred at the commencement of this article. In contrast, and in keeping with the second of these characteristics, Parliament is now about to extend the putative father's financial obligations in relation to his bastard child who has been adopted.

As the law stands today, although an affiliation order is normally discharged by an adoption order, this is not the case if the adoption order is made in favour of the mother being a single woman. However, should the mother subsequently marry the affiliation order ceases to have effect. All this is to be found in subss. (1) and (2) of s. 12 of the Adoption Act, 1950.

In providing that the subsequent marriage of the mother shall cause the affiliation order to cease to have effect the Adoption Act is no doubt attempting to avoid the possibility

of dual financial responsibility. However, this was a non-existent possibility at the time the Act was passed having regard to the fact that the National Assistance Act, 1948, had already abolished a step-father's liability for the maintenance of his stepchildren. The repeal of the provision was recommended by the Departmental Committee with the qualification that the putative father should be allowed to apply for the discharge or variation of the affiliation order on the ground of the mother's marriage (see para. 199). The Children Bill, in cl. 22 (4), follows this recommendation.

COUNCILLOR TENANTS OF COUNCIL HOUSES

Many local authorities in the country are concerned about the position of councillors (or aldermen) who are tenants of council houses, in relation to s. 76 of the Local Government Act, 1933 (interest); does the section mean that such councillors cannot take part in debates, etc., on any housing matters, or is the effect of the section limited in this respect? In many towns the matter is of serious concern, for there may be as large a proportion as 25 or even 50 per cent. of the total membership who are tenants of council houses and in the new towns where local authorities have now been formed, the proportion will be even greater if the houses are eventually handed over by the development corporations.*

Part of the present anxiety on the subject has been caused by the report in *Brown v. Director of Public Prosecutions*, the well-known case in 1956 from Northampton, which established that the motives of the councillor-tenant are irrelevant—as tenant of a council house he has an interest in matters concerning the rent of council houses (in this case, lodger charges), and is guilty of a breach of s. 76 if he votes on such a matter, even if he exercises his vote contrary to his pecuniary interest. In the report of the case in the *All England Law Reports* [1956] 2 All E.R. 189, the Lord Chief Justice is reported as having said (towards the end of his judgment, on p. 191), “for myself I cannot see that councillors who are tenants of council houses and are paying the rent of those houses have not a pecuniary interest. It seems to me that they have a pecuniary interest. If therefore, any question comes up with regard to the rents of those houses they must not vote . . . The resolution [on which the vote was taken] dealt with the rents of council houses and the councillors who are tenants of council houses must abstain from voting on any matter relating to housing† . . . If a person occupies a council house, I think he is debarred by the terms of the subsection from voting on any matter relating to those houses”†. The report in the *Justice of the Peace Reports* agrees with these extracts ((1956) 120 J.P. 303, at p. 306), but in the *Weekly Law Reports* and the *Law Reports* [1956] 2 W.L.R. 1087; [1956] 2 Q.B. 377, there is a significant difference, as the corresponding extracts here read: “Councillors who are tenants of council houses must abstain from voting on any matter relating to the rents of council houses† . . . if a person occupies a council house, I think that he is debarred by the terms of s. 76 from voting on any matter relating to the conditions of the tenancy as to rent or any pecuniary obligation on either side.”†

It is suggested that the extracts from the judgment taken from the *Law Reports* are here to be preferred, as being the

* It may be that this point has had some influence in the present Government's reluctance to agree to development corporations handing over their assets to the local authorities.

† Italics are the author's.

considered opinion of the Lord Chief Justice; if in fact Lord Goddard was accurately reported verbatim in the first extracts given,‡ it is submitted that in so far as he purported to condemn voting on housing matters other than those relating to rent, he was to that extent expressing a view *obiter*. The matter before the Court was one concerning rents, and it was not necessary for the purposes of the decision for any opinion to be expressed on councillor-tenants voting on other housing matters. In applying s. 76 there is some authority for saying that the court will not apply the section where the pecuniary interest is really trivial (see *Nutton v. Wilson* (1889) 53 J.P. 644, *per Lopes, L.J.*), but it should be remembered that both “direct” and “indirect” pecuniary interests are covered.

It is submitted therefore, that it is still open for the court to hold that a councillor tenant is not precluded by the section from discussing and voting on such matters as house designs, selection of tenants, appointments of officers in the housing department, and conditions of tenancy (other than those of a financial nature). Matters which may directly or even indirectly concern rents such as the amount of the contribution to the housing revenue account from the rates, improvements to existing (e.g., pre-war) council houses, or the collection of rent arrears, etc., would probably be caught by the section, although the *de minimis* rule may help in some cases.

Where s. 76 does apply, it may be possible to apply for the dispensation of the Minister of Housing and Local Government under s. 76 (8) to enable a particular councillor or all councillor-tenants to take part in the debate and/or vote on a particular matter. The general principles which will be applied by the Minister in these cases are set out in Ministry Circular 30/56, but the procedure is itself by no means free from difficulties in practice. Thus:

(a) No power exists to enable the Minister to give a general dispensation to a particular member or members covering all housing questions for a specified period. The dispensation can relate only to a specific occasion, so it may be necessary to make a series of applications covering a series of debates.

(b) It must be anticipated by the member requiring the dispensation that a particular matter on which he will wish to speak and/or vote, will be coming before the committee or council (for by s. 95 of the 1933 Act, the procedure applies also to committee meetings), so that he can obtain the Minister's dispensation before the occasion arises. It seems clear that a dispensation cannot operate retrospectively.

‡ The actual words used are not of course part of the official record, except in so far as they are contained in the order of the Court.

(c) In special circumstances, where the fact that a small number of councillors would otherwise be precluded from voting, might affect the council's decision, the Minister has said (in cir. 30/56) that he would be prepared to grant a dispensation if the application is supported by a resolution of the council. This means again that the debate for which the dispensation is sought must be anticipated—with consequent delay in the council reaching a decision—and it is by no means clear whether the "interested" councillors may vote on such a resolution to seek a dispensation.

Applications for the Minister's dispensation, whether supported by a council resolution, or submitted on behalf of one councillor or a group of councillors only, must be forwarded to the Minister through the clerk to the council, who should give a full explanation of the circumstances. It should also be appreciated that it is the duty of the clerk—certainly if he is a solicitor, as an officer of the court, and probably in other cases—to draw the attention of the Director of Public Prosecutions to any case where a member of his council has clearly infringed the terms of s. 76 or s. 95. This should be done without regard to the views of the other members of the council; indeed, it is not a matter for the council at all. Nor is it a matter for the clerk to give advice to individual members of his council as to the application of the section to that individual (or any other individual) in any particular circumstances. General advice often is—and quite rightly, in the writer's opinion—given to the members of the council (or of a particular committee, such as the housing committee) as a body, as to the incidence of s. 76, but the clerk should

not permit himself to get into the position where he becomes the legal adviser to an individual member of the council.

This article has been mainly concerned with the position of councillor-tenants of council houses. The same observations *mutatis mutandis*, also apply to those councillors who are tenants of allotments administered by the council. Co-opted members—and there must be some of these who are "experienced in the management and cultivation of allotments gardens and representative of the interests of occupiers of allotments gardens"—also are subject to the provisions of s. 76, and this fact should not be overlooked when allotments rents and matters related thereto are under discussion. Co-opted members, in particular, may not be aware of the terms of s. 76, and this may be an instance where general advice from the clerk would be warranted.

It is understood that the Association of Municipal Corporations are considering whether—and if so what—amendments are necessary to existing legislation on this topic. Perhaps the answer might be to provide that a council house or allotment tenancy should be regarded as a service, akin to the provision of water, and so covered by the proviso to s. 76 (1). As this argument was expressly (and with respect, we may say we agree with that view) rejected by the court in *Brown v. Director of Public Prosecutions*, *supra*, its adoption would need legislation. As things are, however, quite an appreciable number of councillors throughout the country are, by the operation of s. 76, prevented from carrying out conscientiously the wishes of those they were elected to represent. J.F.G.

§ Allotments Act, 1922, s. 14 (2).

FOOTPATHS SURVEY

DISPUTED PATHS AT QUARTER SESSIONS

(Continued from p. 433, ante.)

III. GROUNDS FOR DISPUTING THE MAP

11. Section 1 of the Act of 1932 indicates the grounds upon which the presumption arising from user can be rebutted. It is necessary to consider in this connexion (a) what paths are capable of dedication, (b) what amounts to an interruption of user, (c) what is involved in user by permission as opposed to user as of right, (d) notices which will negative an intention to dedicate and (e) the other factors which have at common law been regarded as sufficiently indicating an intention not to dedicate.

The general grounds upon which the presumption arising from user may be rebutted were put thus by Denning, L.J., in *Fairey v. Southampton Corpn.* [1956] 2 All E.R. 846: "In my opinion a landowner cannot escape the effect of 20 years' prescription by saying that, locked in his own mind, he had no intention to dedicate; or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be "sufficient evidence that there was no intention" to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right (see *Mann v. Brodie* (3) (1885) 10 App. Cas. 378, 386). Such evidence may consist, as in the leading case of *Poole v. Huskinson* (4) (1843) 11 M. & W. 827) of notices or a barrier, or the common method of closing the way one day a year."

Incapable of Dedication

12. Under s. 1 of the Act of 1932 user is not sufficient if the path is of such a character that user thereof by the public could not give rise at common law to any presumption of dedication.

In the older cases it was said that *prima facie* a highway must lead from one highway to another or from one public place to another (see, e.g., *Austin's Case* 86 E.R. 128 and *Young v. Cuthbertson* (1854) 1 Macq. 455 H.L.).

In more modern times a more liberal view has been taken as to what may be a sufficient terminus to constitute a right of way. "It is no longer the law (if it ever was) that a highway must end in another public highway: see *Moser v. Ambleside U.D.C.* (1924) 89 J.P. 59 and 118). Thus a public right of way may lead only to a point of natural beauty: (*Eyre v. New Forest Highway Board* (1892) 56 J.P. 517 approved in *Moser v. Ambleside U.D.C.*; or to a church or to the sea or to a river, per Phillimore, J., in *Tyne Improvement Commissioners v. Imrie & Others* (1899) 81 L.T. 174. I think *Moser v. Ambleside U.D.C.* is now an authority for the proposition that a right of way may be proved even though it does not lead to a public place." Per Lord Wright in *Williams-Ellis v. Cobb* [1935] 1 K.B. 320.

13. It was at one time thought that a *cul-de-sac* could not be a highway. But since the decision in *Bateman v. Black* (1852) 18 Q.B. 870, it has been established that a highway need not be a thoroughfare. It would seem, however, that if the path is a *cul-de-sac* the burden of proof on the highway

authority will not be so readily discharged (*Whitehouse v. Hugh* [1906] 2 Ch. 283; *Oldham v. Sheffield Corporation* (1927) 43 T.L.R. 222. This is really a separate issue from the question whether the way is capable of dedication, i.e., has the characteristics of a highway. It is a matter affecting the intention of the owner. If the way is a *cul-de-sac*, it will probably be easier for the owner to show that he had no intention to dedicate.

It would seem that a highway cannot exist in law unless one end opens into another highway or public place. See *Bailey v. Jamieson* (1876) 40 J.P. 486—access to way impossible by reason of ways leading to it having been legally stopped up.

Interruption

14. To be effective to rebut the presumption arising from user, acts of obstruction by an owner must be done for the purpose of asserting the right to obstruct. The owner must intend to exclude the public: *A.-G. v. Hemingway* (1916) 81 J.P. 112. It would not, for example, assist an owner to prove the erection of gates, if it could be shown that the gates were to keep cattle in and not the public out: *Lewis v. Thomas* [1950] 1 All E.R. 116.

In *Leckhampton Quarries v. Ballinger & Cheltenham R.D.C.* (1904) 68 J.P. 466, Eady, J., said, "I attribute little importance to these wires as they were manifestly placed to prevent horses from straying and being injured and did not prevent the public passing along these paths." See also Lord Denman's judgment in *Davies v. Stephens* (1836) 7 C. & P. 570, "A gate being kept across it is also a circumstance tending to show that it is no public road, but not a conclusive one: for a road may have originally been granted to the public reserving the right of keeping a gate across it to prevent cattle straying."

15. It was said in *Chinnock v. Hartley Wintney R.D.C.* (1899) 63 J.P. 327, that a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment. Such an interruption must nevertheless be acquiesced in by the public: see the judgment of Lord Cranworth in *Young v. Cuthbertson* (1854) 1 Macq. 455 H.L. "Whether a person excludes the public is a question of degree and the acquiescence of the public is also a question of degree. Certainly the fact that a person has for 22 years prevented people from doing what they had done before for 40 years does not of itself destroy the right."

Where an act of interruption "is ineffective and a failure because the public refuse to acquiesce in it then . . . so far from being proof that there is no dedication, rather works the other way," per McKinnon, J., in *Moser v. Ambleside U.D.C.*, *supra*, at p. 59.

Notices

16. By s. 1 (3) of the Act of 1932 a notice "inconsistent with the dedication of the way as a highway . . . shall in the absence of proof of a contrary intention be sufficient evidence to negative the intention to dedicate." The notices are effective from the date of erection and during the time they are displayed.

The notice to be effective must not be referable to the ownership of the soil rather than to any intention to exclude the public (*Coats v. Herefordshire C.C.* [1909] 2 Ch. 579). Notices such as "Private" "Trespassers will be Prosecuted" are ambiguous compared with ones such as "No footpath," "Private Path," "No Thoroughfare" or "No Right of Way." The former are more easily referable to ownership of the soil and it would take less evidence to rebut the presumption arising from their erection.

Licence

17. A licence may be express, as for example the obtaining of a key on payment: or it may be implied, as e.g., from the fact that the owner has closed the way on one day in each year. "If the party does not mean to dedicate it as a way, but only to give a licence, he should do some act to show that he gives a licence only. The common course is to shut it up one day in every year," Patterson, J., in *British Museum Trustees v. Finnis* (1833) 5 C. & P. 460. A licence may also be implied from the general circumstances surrounding the user by the public. "I also think that the user may be referable to licence where it is by people living in the hamlet and it is necessary in each case to examine the surrounding circumstances in order to arrive at a conclusion" (per Astbury, J., in *Thornhill v. Weeks* (1914) 78 J.P. 156).

18. The sort of circumstances in which a licence might be presumed would include:

(a) Use mainly by workpeople when going to and from their place of work, e.g., to a quarry or gravel pit, or by tenants of an estate and those visiting them. See *Leckhampton Quarries Co. Ltd. v. Ballinger & Cheltenham R.D.C.* (1904) 68 J.P. 464 and *Fenwick v. Huntingdon R.D.C.* (1928) 92 J.P. 41.

(b) Use by villagers but evidence that others were consistently turned back. But where an owner wishes to allow some class of persons to use a path and not others, it is important that he communicate his intentions to the public. Otherwise the public will acquire a right of way (*R. v. Broke* (1859) 1 F. & F. 514).

(c) Use of private drives clearly laid out for convenience of access to a house. See the illustration given by Lord Dunedin in *Folkestone Corporation v. Brockmann* [1914] A.C. 375.

(d) Use of tracks to visit some object of historic interest (*R. v. Antrobus* [1905] 2 Ch. 188).

The Locus in Quo

19. A consideration of the *locus in quo* will sometimes give rise to or strengthen a presumption that user has been enjoyed by licence.

In *Chinnock v. Hartley Wintney R.D.C.* (1899) 63 J.P. 328, Cozens-Hardy, J., said "the weight to be attached to user must depend somewhat upon the nature of the land itself, whether it is cultivated land or rough unproductive land."

In *Behrens v. Richards* [1905] 2 Ch. 619, Buckley, J., said, "To those who are conversant with the Cornish coast . . . it will be familiar that there are frequently to be found rough tracks or paths which have in fact been used without objection made by the landowner for very many years. From this fact alone it is difficult in surroundings such as these are in this case to infer an intention to dedicate."

In a thinly populated district, limited use by the public may be more difficult for the owner to explain away as merely the subject of tolerance: *Macpherson v. Scottish Rights of Way and Recreation Society* (1888) 13 App. Cas. 744 H.L.).

20. In *Blount v. Layard* (1891) 2 Ch. 681n, Bowen, L.J., said "that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused" and later, "I can conceive nothing more unfortunate than that the owners of the right of fishing on large streams should be driven to prevent the successors and followers of Isaac Walton from dropping their lines for trout for fear that their doing so should crystallise into a right. It would be a most unfortunate thing for the

public if that should ever happen, and I think that however continuous, however lengthy the indulgence may have been a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence." These words have since been frequently quoted with approval.* The most recent case was in *De Rothschild v. Bucks C.C.* (1957) 55 L.G.R. 595 in the judgment of Lord Goddard.

Occupation Roads

21. If a private road leads to land in one or but a few ownerships, it seems probable that the character of the road will make it easier for the owner to prove an absence of intention to dedicate. "I think it would be a wholly wrong inference for the courts to draw in the case of an occupation road that because some instances were given in which persons who had no strict right to use the road had used it once or even frequently, therefore you were to infer that the owner of the soil of the road, whoever he might be, had dedicated that road to the public." Neville, J., in *Holloway v. Egham U.D.C.* (1908) 72 J.P. 433.

But if the occupation road serves as a means of access for very many people, the converse is likely to be true. It would be physically very difficult for the owners concerned to see that those passing had a right to do so (*Grand Surrey Canal Co. v. Hall* (1840) 1 M. & G. 392). And it may be that use for occupation purposes has arisen because the road was a public road, it being open to everyone with a field adjoining to open a gate from the highway into his field and use it for accommodation purposes (*A.-G. v. Godstone R.D.C.* (1912) 76 J.P. 188).

A way awarded in an inclosure award as a private road may nevertheless become by use a public highway (*R. v. Bradford* (1874) L.R. 9 Q.B. 552).

Use for Pleasure

22. It has been held that public use purely for purposes of pleasure is sufficient use to raise a presumption of dedication. "The use of the esplanade for any *jus spatiandi* or purposes

of amusement is in no way inconsistent with its being part of the road" (Lord Watson) *Sandgate U.D.C. v. Kent C.C.* (1898) 79 L.T. 425. It is nevertheless true that where the only user is for purposes of pleasure, this fact and a consideration of the *locus in quo* and other circumstances may tend to negative any presumption of dedication arising from user. See *Mildred v. Weaver* (1862) 6 L.T. 225 N.P.

The use of undefined tracks in woods come into this category (see *Chapman v. Cripps* (1862) 2 F. & F. 864, N.P. and *Schwinge v. Dowell* (1862) 2 F. & F. 845 N.P.).

23. All the cases which have been quoted on this point were decided before the motor vehicle and the cycle were in general use, and it is submitted that they must be applied with caution today. As Scott, L.J., said in *Jones v. Bates* [1938] 2 All E.R. 249, "In these days when motor buses, motor cars and motor cycles transport so many into the countryside both for business and for pleasure, and when practically all agricultural workers and indeed most of the rural population have their bicycles, long footpaths which 50 years ago meant so much for ease of communication are infinitely less frequented, and it becomes easier and easier for real public rights of way to disappear just because they become impassable."

It is suggested that the true position today is this. The character of the user is a factor to be taken into account in deciding whether there was no intention during the period of use to dedicate the way. If the use is for purposes of communication, it will be more difficult for the owner to prove the absence of an intention to dedicate than if the use is primarily for purposes of recreation. But if the origin of the path was clearly for purposes of communication, it seems unlikely that much would turn upon the fact that in modern times, the path has been primarily used for pleasure. Most country paths are used today for pleasure rather than for ease of communication, and this factor taken alone and without regard to the origin of the use, is not, it is submitted, of much importance.

(To be concluded.)

WEEKLY NOTES OF CASES

HOUSE OF LORDS

(Before Lord Keith of Avonholm, Lord Macdermott, Lord Somervell of Harrow, Lord Denning and Lord Birkett.)
TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY v. SKEGNESS URBAN DISTRICT COUNCIL

April 28, 29, 30, May 1, June 25, 1958

Rating—Relief—Convalescent home of friendly society—Non-profit making organization—"Main objects charitable or... otherwise concerned with advancement of social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 and 5 Eliz. 2, c. 9), s. 8 (1) (a).

APPEAL from Court of Appeal (1957) 121 J.P. 567.

The trustees of a registered friendly society conducted mutual insurance among the members and occupied for the purposes of the society a convalescent home. In the course of their insurance activities, the society accumulated considerable reserves in the form of investments, securities and land. By the rules of the society a person could become a member if he satisfied certain conditions, and, as a member, he was entitled to certain benefits dependent on the contributions he paid, the benefits being determined in accordance with the society's rules and calculated on an actuarial basis. The rating authority having demanded payment of rates in respect of the convalescent home, the trustees of the society claimed limitation of rates under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), on the ground that the society was an organization which was not established or conducted for profit and whose main objects were concerned with the advancement of social welfare. It was conceded that the main objects of the society were not charitable nor

otherwise concerned with the advancement of religion or education within s. 8 (1) (a).

Held: the society was not entitled to the limitation of rates claimed because, although it was not an organization established or conducted for profit within the meaning of s. 8 (1) (a) since its object was not to make profits despite the existence of very large investments, but to provide security for its members, yet there was no element of public interest and the society was only concerned with the promotion of the private interests of members admitted on a selective basis, and, therefore, the society was not an organization whose main objects were concerned with the "advancement" of social welfare within the meaning of s. 8 (1) (a). *Decision of Court of Appeal affirmed.*

Counsel: *Pennycuik, Q.C., Wigdery, Q.C., and D. Barker*, for the appellants (the trustees of the society); *Sir Arthur Comyns Carr, Q.C., and Scholefield* for the rating authority.

Solicitors: *Woolley, Tyler & Bury; Wrentmore & Son*, for clerk to Skegness Urban District Council.

(Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.)

BOOKS AND PAPERS RECEIVED

(The inclusion in this feature of any book or paper received does not preclude its possible subsequent review or notice elsewhere in this journal.)

A New Life in Old Age. Dr. Heinz Woltereck. Introduction by Lord Amulree, Reinhardt. Price 18s. net.

Preston R.D.C. Abstract of Accounts, for year ended March 31, 1958.

MISCELLANEOUS INFORMATION

LOANS SANCTIONED, 1957-58

The total of loans sanctioned by the Minister of Housing and Local Government to local authorities in England and Wales during the year ended March 31, 1958, was £466 million. The figures for the main services are summarized in the table below.

Purpose	Quarter ended				Total for Year
	June 30, 1957	Sept. 30, 1957	Dec. 31, 1957	Mar. 31, 1958	
	£m	£m	£m	£m	£m
Housing (Land, dwellings, roads, sewers, etc.) ..	62	60	49	54	225
Advances and grants under Housing and S.D.A. Acts ..	16	16	17	12	61
	78	76	66	66	286
Sewerage, sewage disposal and water supplies ..	12	12	14	13	51
Education ..	23	27	17	20	87
Miscellaneous ..	10	9	10	13	42
	123	124	107	112	466

The total shows a relatively small increase of £9 million over the corresponding figures of 1956-57 but is still less by £49 million than the peak year 1955-56.

The three years' figures are compared below.

Purpose	1955-56	1956-57	1957-58
	£m	£m	£m
Housing	229	214	225
Advances and Grants under Housing or Acts ..	90	73	61
Sewerage and water supplies ..	62	41	51
Education	85	92	87
Miscellaneous	49	37	42
	515	457	466

It will be observed that the most important reduction is that for advances and grants under the Housing and Small Dwellings Acquisition Acts. The credit squeeze may have exercised an important influence here.

On the other hand housing loan sanctions have not shown any reduction in total.

CITY OF BRADFORD: CHIEF CONSTABLE'S REPORT FOR 1957

This force began 1958 with a new chief constable, his predecessor having retired, at the age of 65, on December 1, 1957. The year produced a net increase of only one in the actual strength of the force, the final figure being 541, against an establishment of 554.

There seems to be no limit to the additional duties which police officers are prepared to undertake in serving the public; five members of this force have begun training in underwater search and rescue with a programme sponsored by the British Sub Aqua Club.

To assist them in covering the ground more adequately some men on beat duties have been supplied with Vespa scooters, 20 of which were purchased and were brought into operation late in November. The traffic division now has a new headquarters which was officially opened in March, 1957. From the description given in the report it seems that this building incorporates modern features which should add greatly to the convenience and comfort of those who have to work there, and make for increased efficiency.

Crimes increased from 2,795 in 1956 to 3,423 in 1957. A somewhat remarkable increase in the percentage of detections (from 43.8 to 50.6) is explained largely by the fact that one man was responsible for 39 housebreakings and another for no fewer than 158 cases of false pretences, etc. The fact that results can be so affected by chance circumstances of this kind makes one realise that mere figures, of themselves,

can never tell the whole story. Special attention was given during 1957 to crime prevention. For the members of the force there were lectures and discussion groups, the local press co-operated by publishing regular articles on the subject, posters were displayed at police stations, pamphlets were distributed to the public and talks were given to outside organizations. Recommendations to improve security measures were made at 2,011 of the 2,935 business premises visited during the year.

There was a drop from 5,352 to 4,952 in the number of persons prosecuted for non-indictable offences, although there was a considerable jump from 16 to 47 in the number proceeded against for assaults on police. Of the 19 persons prosecuted for driving, or being in charge of, motor vehicles when they had had too much to drink only six were convicted. Eight others were discharged and the remaining five were still waiting trial at the end of the year. The number of charges of drunkenness increased from 676 in 1956 to 767 last year. All were convicted.

PRESCOT DIVISION MAGISTRATES' COURT

Amalgamations of petty sessional divisions may or may not be welcomed, but in this report Mr. M. Hargreaves, the clerk to the justices, refers to the smoothness with which the amalgamation of two divisions was carried out. This he thinks was due in no small measure to the fact that the request for amalgamation came initially from the justices of the divisions themselves, and was not imposed upon them "from above."

Importance is rightly attached to visits by justices to various institutions such as prisons, borstals and detention centres, and for this year visits over a wide range are in contemplation. We think such visits are profitable, for while it is impossible to learn a great deal about an institution by paying a single visit, it is at least possible to get some idea of the way in which it is run and by what kind of staff. Misapprehensions may be removed as in the case of a magistrate who many years ago paid a visit to what was then called a reformatory school and expressed surprise at finding it so little like a prison.

The working of the new procedure under the Magistrates' Courts Act, 1957, and the classes of case in which the justices are not prepared to apply it, are described and it appears that there has been considerable saving of police time and that the convenience of the parties who do attend has been studied.

ROAD CASUALTIES — APRIL, 1958

There were 410 deaths on the roads of Great Britain in April of this year, compared with 352 in April, 1957. The number of persons seriously injured was 4,953, and the number slightly injured 15,723, making a total for all casualties of 21,086, an increase of 666.

Traffic on main roads was 16½ per cent. heavier than in April, 1957, according to a Road Research Laboratory estimate.

The main increase was in casualties to drivers and passengers of motor vehicles other than motor-cycles. One hundred and fifteen drivers and passengers were killed, an increase of 41, and 7,087 injured, an increase of 725. The increase was greater in country areas where there is no speed limit than in the towns.

Police reports show that in the three previous months the most common causes of accidents to motorists were carelessness at crossroads and turning right without due care.

Casualties to drivers of motor-cycles and their passengers numbered 5,330. This was 84 more than in April, 1957, and included 104 deaths, an increase of 11. Drivers of mopeds had 209 casualties, a decrease of 16. Four of these were fatal.

Thirty-seven pedal cyclists were killed and 3,631 injured. The total of 3,668 was 400 less than in April, 1957.

One hundred and fifty pedestrians lost their lives, including 47 children. The total for all pedestrian casualties was 4,677, an increase of 232.

During the first four months of the year, 1,677 persons were killed, 18,201 seriously injured and 58,517 slightly injured. The total of 78,395 is 9,015 more than in the same period last year when petrol was rationed.

HAMPSTEAD AND HARROW RENT TRIBUNALS

The existing Rent Tribunal at Hampstead has been closed and the tribunal amalgamated with the Harrow tribunal.

The office of the new tribunal will be at 181 The Broadway, Cricklewood, N.W.2; telephone numbers: Gladstone 0672 and 0673.

REVIEWS

Beattie's Elements of Estate Duty. London: Butterworth & Co. (Publishers) Ltd. Price 27s. 6d. net.

This work is described as intended primarily for the student, with a warning in the preface that even the elements of estate duty are difficult. It is a topic which requires careful attention to detail, and becomes more complicated year by year, largely because of the according by Parliament of special treatment to cases of hardship which happen to be brought to notice. Since the first edition appeared in 1952, this method of buying off opposition (to the confiscatory nature of the tax upon estates passing at death) has been extended to some kinds of business assets, and to further groups of life policies. The learned author expresses the opinion in the preface that the matter could have been simplified, without loss to the revenue, if the highest rates of duty had been reduced and the exceptions removed. Incidentally this would have lessened the temptation to many kinds of tax avoidance, which are now openly practised in conformity with the statutes. The law is stated as at August 1, 1957, and therefore missed the striking decision of the Court of Appeal in *Re Hodge's Policy* (The Times, November 13, 1957), but the chapter on life policies, to which with *Hodge's Policy* in mind, we naturally looked on receiving the book for review, makes admirably clear the principles on which the Court of Appeal reluctantly decided that case, and mentions the precedents for the decision. This is but one illustration of the clarity with which the work sets out difficult and complicated matters. The arrangement and content of the chapters is more or less dictated by the statutory provisions from 1889 to the present day. Thus the general principles are followed by exemptions and by chapters upon gifts *inter vivos*, and then, by special species of property such as joint tenancies, life policies, settlements, and so forth. The rules about the valuation of assets are dealt with fully, and include an informative chapter upon shares in controlled companies, with sub-divisions according to the manner in which these pass on death. The liability of executors and administrators, and the special rules for real and personal estate, foreign estate, and so forth, are carefully explained.

Although this is primarily a book for students, it is the sort of book which every practising solicitor could usefully keep near his desk, for he can never tell when some topic relating to estate duty will arise in advising a client about the making of a will or distribution of assets.

Problem of Divorce. By R. S. W. Pollard. London: Watts. Price 12s. 6d. net.

Here is a lucid account of the secular view of the divorce laws. Mr. Pollard has clearly studied the subject intensely, and he is an ardent advocate of further changes in the laws governing divorce in this country. In general his suggestions are those made familiar by the Marriage Law Reform Society in the evidence they submitted to the recent Royal Commission on Marriage and Divorce. Mr. Pollard expresses strong disappointment at the Commission's report, and he clearly thinks it incumbent on all who wish for far-reaching changes to pursue the matter along whatever lines are from time to time available.

His expository chapters show him at his best. Certainly it is hard to imagine the history of divorce, and the present state of the law, dealt with more clearly. He is less successful when he comes to deal with the attitude of those who take the view that marriage is a sacrament, of its nature indissoluble by human law. It is a pity for instance that, in his chapter "Marriage and the Church of England," he fails to come to grips with the doctrine of "one flesh," and that he does not mention the marriage vows. It is rather curious that the latter tend to be overlooked by writers of the humanist persuasion, but there they are—perfectly explicit and made openly, deliberately, and attended with circumstances of sanctity.

It is a pity that divorce should be one of those questions on which opinion seems doomed to be permanently divided. The trouble lies, no doubt, in the fact that the religious and the secular views of human relationships take such entirely different postulates as their foundations. Mr. Pollard's book is full of the plea for happiness, here and now. Those who are moved by this approach will find him a doughty champion. I have read many books on this subject, but never one with less padding and with a better command of language. For all Mr. Pollard's eloquence, however, the title of his book is likely to obtain as long as Western civilization survives: for the problem of divorce is but one aspect of the eternal struggle between opposing views

of human life. Mr. Pollard, however, can afford to be a little calmer than he is at some points: it is his view of the matter which is steadily gaining ground. Patience and persistence will probably bring him a good deal nearer to his goal, even if his Utopia of divorce by consent should be denied.

The Parish Councillor's Guide. Tenth Edition. By H. W. Cauthery. London: Shaw & Sons, Ltd. Price 10s. 6d. net.

This small book has been before the public for some time, and the appearance of a tenth edition indicates that it has been found useful. From the beginning its editors have been connected with what is now the Ministry of Housing and Local Government, and the guidance given here has been as much on the practical side of what parish councillors wish to know as upon legal points. Although it is less than two years since the ninth edition, the tenth has been brought out by reason of the Parish Councils Act, 1957, which adds some new powers to those formerly exercisable by parish councils, and also gets rid of the remnants of the Lighting and Watching Act, 1933, a primitive statute which had haunted the lighting of country places far too long. There have also been changes in the procedure of parish council elections, made by the Local Government Elections Act, 1956.

This does not profess to be a lawyer's book and the usual tables of statutes, cases, and statutory instruments have deliberately been omitted, in order to reduce the size and cost. The main statutes are cited briefly by their dates without full titles, and similarly the clumsy titles now borne by the Ministries most concerned with parish council work have been abbreviated. There is, moreover, no index; the editor and publishers hope it will be found unnecessary, because of the alphabetical arrangement of the subject matter and the provision of cross references. We have an instinctive fear that this last mentioned economy will have reduced the value of the book, but time will show. Bearing in mind that it is designed for laymen, we have checked it at several points and found the information adequate.

Within the limits deliberately set by those responsible for the book, it can be confidently recommended.

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MEDITERRANEAN SCENE—III

Spotorno, Liguria, Italy.
June 21.

One of the most impressive facets of the Italian scene, as every visitor knows, is the important part played by the Church in the everyday life of the people. Religion is not a matter merely for Sundays, high days and holy days; the churches are open all day, and practically all night; between services, scarcely a minute passes without some worshippers dropping in (that seems an appropriate and not disrespectful expression), spending a few moments in prayer or meditation, and hurrying out again to proceed on their ordinary errands and avocations. This is particularly so with the women and children of all ages.

Apart from all this regular activity, the *fiesta* is an institution which, in its frequent recurrence, the opportunity it affords for demonstrations of simple piety, and its happy blend of the sacred with the secular, is unique in Mediterranean life. Two weeks ago occurred the *fiesta of Corpus Domini*, which was the occasion for impressive solemnities inside the church, followed by a procession round the narrow streets and squares. The church in this little town is by no means an imposing structure; its façade is a flat surface of stucco, roughly painted to produce the illusion of three-dimensional architecture and sculpture, which gives it the appearance of a backdrop on a stage. The interior, though rather ornate, after the manner of all Italian religious buildings, is comparatively simple and inexpensively constructed. Yet the observer sees at once that, for a great number of the population, it is the centre of daily life as well as municipal activity.

The procession formed up; in front, children from four to 14, directed and watched by their devoted mothers, grandmothers, sisters and aunts—the girls in white bridal costumes, with a profusion of lace and veils; the boys uniform in their best suits, with white cotton gloves, white socks and white rosettes on their sleeves. Behind them came the women, old and young, many of the latter carrying infants in their arms. Bands of young girls went ahead, scattering vari-coloured petals along the streets where the procession was to pass, and in certain places arranging heads of flowers in heart-shaped patterns. The centre of the *cortège* was formed by a group of choirboys, in their surplices; in the midst of them, under a canopy, the old priest, in robes and *biretta*, carrying the sacred relics. The town's brass band (somewhat incongruously) brought up the rear. A sprinkling of curious spectators stood along the route; but the most striking thing was that the ordinary traffic and life of the town did not pause for a moment, the chant of *Ave Maria*, *gratia plena* mingling with the raucous hooting of Vespa motor-scooters, and the strains of the brass band being punctuated with the rattle of two-stroke internal combustion engines.

A few days later was celebrated the *fiesta* of the Holy Annunciation, conveniently coinciding with the opening of the holiday season. On Saturday afternoon coloured balloons were launched from the beach, and games for the smaller children were arranged. At dusk there was feverish activity in all the streets, where canopies bearing a large and ornamental M (the initial letter of the word *Maria*) had been hung, coloured illuminations put up, and the *campanile* of the church—and even the Saracen castle on the hillside—outlined in electric lights. A large, illuminated model of a monstrosity, sending out bright rays in all directions,

appeared on the church façade; and it was at this point that the torchlight procession formed up. Again the children led the way, each bearing a lighted candle, sheltered from the air in a gaily-painted cardboard cup; then came the women, followed by the priest and choirboys as before, the inevitable brass band bringing up the rear. A new feature of these solemnities was the presence of a vigorous, black-bearded monk, who halted the procession at the corner of every *piazza* and preached eloquently to the crowd. By the women, children and old men, whose features were marked by strong devotional piety, he was listened to with rapt attention; it was noticeable that his addresses were simple in sentiment, and in language forceful and direct. The day ended with the secular part of the celebrations—bicycle-races and a grand display of fireworks.

A provocative question (as *The Times* correspondents pointed out during the recent elections) is posed by the presence, side by side, of the Roman Catholic Church, an institution of almost universal appeal, and a powerful Communist Party. A sharp contrast, during this past week, was afforded by the posters, all over the town, announcing *La Solennità della Santissima Annunziata*, in juxtaposition to others, of equal prominence, advertising the election successes of the left-wing parties, including an increase in the Communist vote from six to six and three-quarter million, and in the number of Communist deputies from 193 to 200. These posters called for the unity of the working class "in the face of clerical tyranny, political reaction, and preparations for war"; they drew the moral (appropriate from their point of view) from recent happenings in France, referring in unflattering terms to Pflimlin, Mollet and de Gaulle. In the light of the figures quoted above, the virtual absence of young and middle-aged men from the religious celebrations we have described, takes on a significant aspect. One wonders what the future will bring forth.

A.L.P.

ADDITIONS TO COMMISSIONS

ANDOVER BOROUGH

Mrs. Gladys Hilda Shaw Porter, Highfield, Weyhill Road, Andover.

LINCS. (Parts of Kesteven) COUNTY

Mrs. Annemarie Christine Blow, Home Farm, Wilsford, Grantham.

Mrs. Jean Patience Dixon, The Manor House, Bitchfield, Grantham.

Leslie Arnold Grey, Caythorpe Hall, Caythorpe, Grantham.

Mrs. Irene Loveday Hoskins, St. Mary's Vicarage, Stamford.

Mrs. Antonia Hilda Mary Jarvis, Doddington Hall, Lincoln.

MONTGOMERY COUNTY

Dame Ruth Eldrydd Davies, Plasdinam, Llandinam.

Maurice Hughes, Tegfan, Middletown, Welshpool.

Mrs. Myfanwy Jane Humphreys, Bryntirion, Llandymynech.

Mrs. Gwyneth Jones, Llyssun, Llanbrynmair.

James Wilfred Jones, Post Office, Llangurig, Llanidloes.

John Trevor Jones, Varchoel, Guilsfield, Welshpool.

Mrs. Marion Morgan, Mount Einion, Llanfair Caereinion, Welshpool.

Samuel James Stewart, White House, Arthur Street, Montgomery.

WESTMORLAND COUNTY

William Dobson, Watercrook, Kendal.

Dr. Eric Lambton Fothergill, Oakland, Millans Park, Ambleside.

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PRACTICAL POINTS

All questions for consideration should be addressed to "The Publishers of the Justice of the Peace and Local Government Review, Little London, Chichester, Sussex." The questions of yearly and half-yearly subscribers only are answerable in the Journal. The name and address of the subscriber must accompany each communication. All communications must be typewritten or written on one side of the paper only, and should be in duplicate.

1.—Commons—Transfer from council to council—Depasturing sheep for benefit of land.

My urban district council acquired the soil of approximately 100 acres of common land, and all the rights and interest of the lord of the manor relating thereto, under the provisions of the Open Spaces Act, 1906. The common lies partly inside and partly outside the council's area, and no scheme for regulating the use or control of the common has been made. Certain known persons are believed to have common rights, but this list is probably incomplete, and the full extent of the rights is not known. Two points arise out of the council's ownership, as follows:

1. My council wish to give part of the common to the parish council in whose area it lies, and the parish council are willing and anxious to accept it. The Ministry of Housing and Local Government have stated that, because s. 10 of the Act of 1906 provides that the council shall hold and administer the land in trust to allow enjoyment thereof by the public as an open space, and because s. 179 (d) of the Local Government Act, 1933, states that nothing in that Act shall authorize the disposal of land by a local authority in breach of any binding trust, the Minister is debarred from giving consent to the proposal.

Will you please advise whether:

(a) it would in truth be a breach of trust to dispose of part of the land to another authority who would hold on precisely the same trusts as my council;

(b) the Minister's consent to the proposed gift is essential;

(c) generally.

2. The common land is at present in good condition, but is only grazed to a limited extent by animals belonging to some of the persons claiming common rights. The extent of the grazing is not sufficient to keep the land in good condition, and mowing or some other course of action will become necessary.

Leaving aside all question as to the council's legal right to graze animals on the common, will you please advise whether there is any authority for the council to purchase sheep to graze the common during the summer months, the intention being that they shall be disposed of at the end of the summer?

CARLEL.

Answer.

1. (a) Yes, in our opinion. The council are statutory trustees, and cannot divest themselves of their duty by appointing new trustees, in breach of an enactment which says that they shall hold and administer.

(b) Does not arise, but if the land could be transferred the answer would be yes.

(c) The council can administer the common or a part thereof through a committee, by virtue of s. 85 of the Local Government Act, 1933, and under subs. (3) can appoint members of the parish council as members of that committee. But we do not think they can delegate to the committee any functions with respect to the part of the common in the rural parish. This both because of the requirement in the Act of 1906 that they must administer as well as hold, and because that part of the common is not "part of the area" of the urban district council.

2. Subject to the custom of the particular manor, the lord enjoyed grazing rights concurrently with the commoners: if the council owned commonable animals (if, for instance, they still used horses) they could turn these out. Being empowered by statute to own land, they have in our opinion an implied incidental power to buy grass seed, mowing machines, fertilizer, and other adjuncts normally used to keep the land in good condition. Sheep do the work of mowing and fertilizing more cheaply and efficiently than machines, apart from ornamental greensward, and we see no legal difficulty about engaging them. When they have done their work they can be disposed of, just as a superseded machine can be sold and a new one bought next year.

2.—Food and Drugs—Registration of premises for sale of ice-cream—Food and Drugs Act, 1955, s. 16—Licensed premises.

The licensee of a full licensed house in this division has been prosecuted under s. 16 of Food and Drugs Act, 1955, for using the premises for the sale or storage of ice cream when not registered for that purpose with the local authority. According to subs. (3) of this section, registration is not necessary for premises

wholly or mainly used as catering premises. "Catering premises" as defined in s. 135 means premises where in the course of business food is prepared and supplied for immediate consumption on the premises. "Food" lower in the interpretation section includes drink. Can the usual type of licensed house be considered to prepare and supply food and thereby become catering premises and under these circumstances do you consider these premises must be registered with the local authority in view of the above exemption?

G. NEAPOLITAN.

Answer.

Each case would depend on its particular facts. We think it would be difficult to argue that the usual type of licensed house could be used "wholly or mainly" for catering purposes. Although by definition "food" includes "drink," in our opinion that fact alone is not enough to bring premises supplying drink only within the definition of "catering premises." A licensee can hardly be said to "prepare" drink, and some meaning must be attached to the word "cater," which means "to provide food." In short, we do not consider that the premises which the query calls "the usual type" come within the exemption, even in those cases where they provide meals.

3.—Food and Drugs—Registration of premises for sale of ice-cream—Food and Drugs Act, 1956, s. 16—Off-licence—Food and Drugs Act, 1955, s. 117.

The licensee of an off-licence is also desirous of selling ice-cream. He cannot seek the same protection as the above licensee (if you considered the above is a catering premises) because the drink is consumed off the premises. He therefore must register in accordance with s. 16 of Food and Drugs Act, 1955. The local authority have refused to register the premises under s. 18 of the above Act and the licensee is desirous of appealing against the refusal under s. 19 (4) and s. 117. Is the court restricted in the same way as the local authority as to the grounds of refusal (1 (a) and 1 (b) of s. 19) or has the court unrestricted power to grant or refuse such appeal?

G. ORANGE.

Answer.

In the event of an appeal to a magistrates' court, the whole issue is reheard and the court is not limited to deciding merely the correctness of the grounds for the local authority's decision (*Fulham Metropolitan Borough Council v. Santilli* [1933] 2 K.B. 357; 97 J.P. 174). The court is entitled to substitute its own opinion for that of the local authority (*Stepney Borough Council v. Joffe* [1949] 1 K.B. 599; 1 All E.R. 256).

4.—Game—Game Licences Act, 1860, s. 4—Form of information.

In the case of *Laxton v. Jeffries* (1894) 58 J.P. 318, it was held that an information charging the respondent that he "did take and kill and pursue certain game . . ." was a charge of one offence only.

It is stated in *Stone* (1957) vol. I, p. 232, that the offence may be described in the information "in the words of the Act, etc., or similar words," and "It will be sufficient in describing the offence to use the words of the statute," and further, Lord Campbell observed "The general rule now is that if you follow the words of the Act, the conviction is right." The words of the statute in respect of an offence under the Game Licences Act, 1860, s. 4, are "take, kill or pursue . . ." and it has been the practice of my council to word informations accordingly.

Recently, a learned clerk to the justices of a local court has informed me that in his opinion objection might be taken to this form of information as being bad in law by charging more than one offence, quoting as authority the case stated above, and that properly the information might be laid in the words "did take kill and pursue game . . ."

It will be observed that Lord R. Cecil for the appellant said "If you kill a partridge you must take it, and if you take it you must pursue it." Mathew, J., concurred with this.

I shall be glad of your learned opinion as to the correctness or otherwise in following the words of the statute in this instance.

H.C.L.T.O.

Answer.

On the authority of *Laxton v. Jeffries*, *supra*, we think that the words "did take kill and pursue game . . ." are in order since

that case dealt with this very point. At the same time, in *Field v. Hopkinson* (1944) 108 J.P. 21, Caldecote, L.C.J., said: "If an enactment forbids the doing of act A or act B it creates two offences and a conviction of both offences on one information is bad for uncertainty." We think it would be more in keeping with modern practice to choose the appropriate word from "take kill or pursue" and use that in the information. It is significant that the information given in *Oke* for the somewhat similar wording of s. 23 of the Game Act, 1831, has "take" in square brackets as the alternative to "kill." Lord Campbell's dictum ought not to be accepted too rigidly where an Act contains alternatives.

5.—Highway—Erosion of path beside river.

The sewage works of my council border a river and the deeds of the land give the council ownership of half the river bed. Along the bank of the river, and separated from the works by a hedge, is a public footpath. This path has been in existence for many years and is on the footpath map under the National Parks and Access to the Countryside Act, 1949. In times of flood the river erodes the bank and for some years the sewage works attendant has repaired the bank as far as possible. Recently however the erosion has become more severe and in two places the footpath is dangerously undermined.

1. Does any liability for the repair of the bank fall upon either the footpath authority or the river board?
2. If the answer to 1 is no, can my council be forced to repair the bank so that the footpath is made safe for use?

EDBERC.

Answer.

1. We think not, on the authority of the cases in which it was held that the parish was not liable when a highway perished by erosion.

2. In our opinion, the landowner equally is not liable.

6.—Highway—Footpath—Stile out of repair—Remedy of person injured.

A public footpath crosses a farm and at the point of exit to a public road there is a stile. This stile is defective in that it leans towards the road, in such a fashion that it is potentially dangerous for a person who is not young and agile to climb over.

1. Can the land owner be compelled to put the stile in proper order?
2. Is the land owner liable in damages to any person who falls in trying to surmount the stile?

DANGER.

Answer.

1. Unless it can be shown that a stile has been erected across a footpath previously dedicated without it, the stile is not unlawful. In the situation here described, there would probably always have been a fence keeping livestock from the road, and the stile amounts to a passage through the fence, so that the public accepted the path as a highway subject to this stile. This being so, the owner is not liable to repair it unless he is liable for repair of the path which it crosses: *Rundle v. Hearne* (1898) 78 L.T. 561; *Robbins v. Jones* (1863) 9 L.T. 523. The question who is liable for repair of the footpath might depend upon the date of its being dedicated. We assume for present purposes that this path was dedicated before the coming into force of s. 49 of the National Parks and Access to the Countryside Act, 1949, so that it is probably repairable by the highway authority.

2. Even if the owner is under an obligation to repair, as explained above, it is almost certain that a person injured by failure to repair has no cause of action: see the judgment of Lord Russell, L.C.J., in the case first cited, where he based himself upon the authority of Baron Martin. If the highway authority are liable, there is again no private right of action, because the failure of repair is mere non-feasance.

7.—Husband and Wife—(1) Summons for desertion—Wife's offer to return to husband—Husband's refusal to have her back. (2) Summons for desertion—Desertion prior to complaint proved—Bona fide offer of husband.

A complaint on the ground of desertion was made on January 16. The case was heard by the magistrates on February 5, and after hearing the complainant's and defendant's evidence the court adjourned the case for both parties to see the probation officer with a view to reconciliation.

At the adjourned hearing the court is informed that reconciliation has not been effected. On the facts of the case the magistrates are of opinion that on the evidence there was no desertion. However, during the course of the complainant's evidence she had stated that she was prepared to return to the defendant.

The question has been raised as to whether the magistrates can consider the offer made by the complainant to return to the defendant is a *bona fide* offer, which the defendant has refused, and if so whether they could make an order on the ground of desertion on the complaint laid on January 16 or whether the magistrates must dismiss that complaint, leaving the complainant to lay a fresh complaint based on her subsequent offer to return.

2. Similarly, if on the hearing of a case for desertion the magistrates find desertion prior to the complaint proved and subsequently in the court the defendant makes an offer to return which the justices think is *bona fide*, must they make an order in view of the fact that they have found desertion proved prior to the complaint, or can they dismiss the complaint notwithstanding finding desertion proved up to the date of the complaint?

FIMBON.

Answer.

1. We assume that at the adjourned hearing no further evidence was given by the parties and that the court had already come to the conclusion that there was no desertion. This must mean that they were not satisfied that the wife was justified in leaving her husband and we cannot see what difference her offer to return to him can make. In our opinion, the justices must dismiss that complaint, and leave the complainant to lay a fresh complaint.

2. If the justices are satisfied that the husband's offer to return is *bona fide* and the wife refuses to have him back, they should dismiss the complaint.

8.—Landlord and Tenant—Distress after eviction.

In reply to Dillin at p. 114, *ante*, you state that the giving of notice to quit followed by a notice of intention under the Small Tenements Recovery Act, 1838, does not deprive the landlord of his remedy in the county court, or by distraint. Please advise whether a council still has the remedy of recovering arrears of rent by distraint after a tenant has vacated a dwelling-house, either voluntarily following notice to quit or as a result of a county court possession order.

ADILLY.

Answer.

If the ex-tenant's chattels have been left upon the premises, we see no legal obstacle to distraining them.

9.—Local Government—Election of alderman to fill casual vacancy—Failure to elect.

By reason of the retirement of an alderman from my council a casual vacancy occurred. As town clerk I duly made arrangements for an election to be held to fill the vacancy at the next ordinary meeting of my council. Voting papers were circulated to each member of the council present at the meeting, and instructions given for their completion. The voting papers were returned to the mayor who was presiding at the meeting, and on being checked it was ascertained that a nomination had not been made. It was explained to members that it was their duty to hold an election and to nominate someone for the vacant position, but the members were adamant in their refusal to make a nomination. The mayor, therefore, declared that since no nomination had been made the election was void. Some months later another vacancy arose and exactly the same position occurred, with the result that the further election was declared void. In the interim no further steps have been taken to fill the vacancies.

Your opinion is requested as to what action the town clerk should take. Should he endeavour to hold another election at the annual meeting of the council, in an effort to fill the vacancies?

CALIN.

Answer.

We take it that the "nomination" mentioned in the query is the writing by the councillor of a name, as required by s. 22 of the Local Government Act, 1933, applied to casual vacancies by s. 66, and that all the councillors present handed in blank papers. An election must be held at the next ordinary meeting after the vacancy; it cannot take place at the annual meeting unless by virtue of the last three lines of s. 66 (1), which do not apply here, or by order of the High Court under s. 72 (2). The town clerk should in our opinion instruct counsel to move the High Court as soon as possible. In the circumstances, we do not think he requires an authority from the council to do so. The Court may be expected to make some comment upon the refusal of councillors to write their nominations; *cp.* the comments in the case of *Re Barnes Corporation, ex parte Hutter* (1933) 97 J.P. 76. Such comment, with an order for costs under s. 72 (2), may have more effect than the town clerk's exposition of s. 22.

10.—Probation—Extent of court's power to award compensation—Criminal Justice Act, 1948, s. 11 (2).

Is the power to order payment of damages or compensation following the making of a probation order, contained in s. 11 (2) of the Criminal Justice Act, 1948, available to a magistrates' court, of general application even where there is no power to order such a payment under the statute creating the offence for which the offender is put on probation, for instance s. 51 of the Malicious Damage Act, 1861 (malicious damage above £25)?

FOSOR.

Answer.

We think the power to order payment of damages or compensation under s. 11 (2) of the Act is of general application and not confined to cases where the statute creating the offence gives such a power.

11.—Public Health Act, 1936—Water main laid in private land—Building over main.

I am interested in your reply to P.P. 6 at 122 J.P.N. 278, to the effect that the prohibition against building over sewers in s. 25 of the Public Health Act, 1936, is not applied to building over water mains by s. 119 of the Public Health Act, 1936. The learned editors of *Michael and Will* on the law relating to water appear to take a different view, because they include s. 25 of the Act in a list of sections in part II of that Act which are relevant for the purposes of s. 119. Your further observations would be appreciated. The point is important to Public Health Act water undertakings. See also *Abingdon Corporation v. James and Thane*, 104 J.P. 197; [1940] 1 All E.R. 446.

PALCES.

Answer.

When saying in reply to P.P. 6 at p. 278, *ante*, that s. 119 of the Public Health Act, 1936, did not apply s. 25 to water mains, we considered that the words "laying and maintenance" and the later words "construction and maintenance" in s. 119 were not apt to describe the power given by s. 25, which is rather a power of "protection." *Lumley's* note at p. 2574 suggests that "laying and maintenance" of mains means the same as "carrying" mains, and at p. 2575 he does not include s. 25 among the sections applied by s. 119. In *Abingdon Corporation v. James and Thane*, 104 J.P. 197; [1940] 1 All E.R. 446, at p. 200 of our report, Simonds, J., said (as does *Lumley*) that s. 23 was applied by s. 119—s. 23 speaks of maintaining. It was the defendant's counsel who argued that s. 25 applied and that subs. (3) was the local authority's only remedy, because he wished to bring himself within the exception in s. 25 (3) for a building erected before the passing of the Act. The local authority were not concerned to dispute the applicability of s. 25 (3), because the latter part of that subsection, if it applied, would have given them a power to pull down if they could defeat the exception. What Simonds, J., decided was that neither part of subs. (3) applied. Our report at pp. 200–202 shows that he granted an injunction upon the footing that s. 23 could not be satisfied if the defendants' buildings remained. He did not therefore have to decide the point upon which both sides were agreed, namely, whether s. 25 as a whole applied at all. This point, accordingly, seems to be still open.

Having regard, however, to the present query, and to the fact that *Michael and Will* suggests that s. 25 is applied by s. 119, we have looked again at P.P. 6 on p. 278, *ante*, and will for that purpose assume that *Michael and Will* rather than *Lumley* is right.

The facts were stated in that query in the alternative. If the plans showed the building to be clear of the water main, the local authority could on the above assumption proceed under s. 65 (2), because the work as carried out was "executed without plans having been deposited." If on the other hand the plans showed the building to be over the water main, the local authority could not now proceed against the owner under s. 65 (2), even on the above assumption, because they did not reject the plans or pass the plans subject to any requirements. Nor could they now, in our opinion, take any other proceedings upon the basis of *Abingdon Corporation v. James, supra*.

It would not, in this latter event, make any difference that the council's official warned the foreman on the site, because the council's consent had by then been given.

12.—Public Health Acts Amendment Act, 1907, s. 94—Conditions of licence.

The above section empowers a local authority to grant "upon such terms and conditions as they may think fit licences for

pleasure boats and pleasure vessels to be let for hire or to be used for carrying passengers for hire, and to the boatmen or persons assisting in the charge or navigation of such boats and vessels." In purported exercise of their power to impose conditions, my council have decided to require all boatmen to be medically examined at intervals in order to ensure the safety of their passengers. The circumstances which gave rise to this decision were that several of the existing boatmen were in the region of 80 years of age, but were still handling boats alone in places where currents were liable to be particularly strong, and there is a danger of vessels being driven on to rocks.

In advising the council on this matter, I have taken the view that although there appears to be no precedent for such a condition, the section is contained in a Public Health Act, and it appears that the public safety was in the mind of the draftsman in subs. (2).

These medical examinations are not onerous in their frequency, the council's decision being as follows:

(a) that all applicants for boatmen's licences be required to submit themselves for an initial medical examination and for re-examination every five years up to the age of 65 years; thereafter to submit to annual medical examination;

(b) that no objection be raised to the medical examination being conducted by the applicant's medical practitioner but that the council's medical officer of health be required to act as the council's adviser as to the medical fitness of the applicants.

PEXOM.

Answer.

We think the condition is reasonable, as described in the query.

13.—Public Health Act, 1936, ss. 268, 269—Licence deemed to be granted.

Is not the statement in the answer (b) to P.P. 8 at p. 178, *ante*, inconsistent with answers in which you have advised that licences under s. 269 (1) (i) of the Public Health Act, 1936, are licences (in the wording of the section) "authorizing persons to allow land occupied by them . . . to be used as sites for movable dwellings" and are therefore unavailable to succeeding occupiers?

PELTIS.

Answer.

We agree that the view expressed earlier, at 118 J.P.N. 477 and 119 J.P.N. 227, is to be preferred.

14.—Rating and Valuation—Distress—Bill of sale.

We act for a local rating authority to whom is owed a sum of money by a ratepayer against whom the local authority have obtained an order in the magistrates' court authorizing the levying of a distress for the outstanding rates. It is found that all the goods of the ratepayer are comprised in a duly registered bill of sale given by way of security. This bill of sale contains a clause empowering the grantee of the bill to seize the goods in any of the events specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882. One of these events is that the goods or any of them are distrained for rent, rates, or taxes.

According to *Halsbury's Laws of England*, vol. 3, p. 315, a bill of sale given by way of security is not protection against distress for taxes or rates, but this is limited to rates which supersede or have the character of the former poor and other parochial rates.

It would be appreciated if you would let us know:

(a) Whether you agree that the local rating authority can validly distrain on the goods comprised in the bill of sale for the rates outstanding, and in respect of which they obtained the magistrates' order;

(b) That if they do so they run the risk that the grantee, under the bill of sale, can then, in accordance with the power given by the bill, himself take possession of the goods so seized because of the specific power to that effect contained in the bill;

(c) If the local authority do distrain on the goods comprised in the bill, is there anything which they should do to protect themselves as regards any possible claim or action by the grantee of the bill of sale, in view of the power given to him by the bill to take possession of the goods should they be distrained upon for rent, rates or taxes?

PILFA.

Answer.

(a) Yes, in our opinion.

(b) The grantee may only seize those goods not seized under the distress warrant.

(c) So long as it is clear to the grantee which goods have been seized under the distress, no further protection is required.

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